90-125

NO. 90-_____

Supreme Court, U.S.
FILED
JUL 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1990

HUGHES ANDERSON BAGLEY, JR.,

Petitioner,

v.

COPY

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

I

Whether one who has been the victim of an unconstitutional search and seizure is entitled to the expungment of all records created as a result of that Constitutional violation?

PARTIES TO THIS ACTION

The only parties to this action are those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner HUGHES ANDERSON BAGLEY, JR. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Order of the district court (App. 1-18) was not reported. The opinion of the Court of Appeals (App. 19-25) is reported at 899 F. 2d 707 (8th Cir. 1990). The Court of Appeals denied rehearing on April 19, 1990 (App. 27).

JURISDICTION

The Order of the Court of Appeals denying rehearing was entered on April 19, 1990. This petition has been filed within the ninety days permitted by Rule 13.1.

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1). The Constitutional provisions relevant to this Petition are the Fourth Amendment prohibition against unreasonable searches and seizures and this Court's prior decisions holding that Constitutional violations must be remedied to the maximum extent possible.

STATEMENT

1.) On January 22, 1984, as the result of a warrantless search of a briefcase belonging to Petitioner, Iowa authorities seized two handguns and obtained information all of which were sub sequently used as the sole basis for an indictment.

2.) After the search was held illegal, the government moved to dismiss the indictment. Petitioner then moved to

expunge all records which resulted from the illegal search on the basis that they were the result of a Constitutional violation and that he was entitled to expungment as a remedy for that violation. The district court denied relief and the United States Court of Appeals for the Eighth affirmed, United States v. Bagley, 899 F. 2d 707 (1990).

While recognizing that it had the inherent power to order expungment, the district court reasoned that expungment is a remedy which is to be granted only in "extreme circumstances" and that it had a duty to apply a "balancing test", on a case-by-case basis, in which it weighed the government's interest in keeping records to further effective law enforcment against the privacy interests of the individual (App. 5-7). In reviewing "the equities in the case at

bar", the district court found that even though Petitioner had been indicted solely on the basis of the fruits of an illegal search, it was not persuaded that the "extreme remedy" of expungment was appropriate (App. 9-10). It based its decision on its findings that Petitioner had not charged that there had been harassment, that the exclusionary rule is itself an "extreme remedy" applied by few courts outside of the United States, that Petitioner's record is "not pristine" and that Petitioner had already received a remedy for the Constitutional violation in the form of suppression (App. 11-13).

3.) The Court of Appeals denied Petitioner's appeal, holding that the power to expunge criminal records was a "narrow one" which was infrequently used and that this case presented no "extra-ordinary" circumstances warranting

expungment (App. 20-21). The Court of Appeals adopted the district court's balancing test wherein the government's interest in keeping criminal records is weighed against the individual's right to privacy (App. 21). The Court of Appeals expressed the opinion that the records of Petitioner's arrest were "valuable law enforcement records" and that the adverse consequences to Petitioner from the records were minimal (App. 22). It further found that expungment was not appropriate because the illegal search and seizure did not effect Petitioner's indictment, Petitioner was clearly not innocent and he had already had his remedy for the Constitutional violation when the district court suppressed the use of the illegally seized evidence prior to trial (App. 22-23).

The Court of Appeals also found that

Petitioner's failure to claim he was the victim of harassment or to show that the government might misuse the records in the future or that he was likely to suffer some other future adverse consequence prevented expungment (App. 23-24).

In so holding, the Court of Appeals did not address the issue, although it had been squarely presented in Petitioner's briefs, of whether one who has been the victim of a Constitutional violation is entitled to a remedy which as nearly as possible erases all traces of the violation. Like the district court, the Court of Appeals failed to distinguish between requests for expungment which are the result of mere acquittals or dismissals and those requests which result from a Constitutional violation.

JURISDICTION BELOW

The district court's jurisdiction was founded in Title 18 U.S.C. Section 3231, which grants original jurisdiction over all offenses against the United States. It is also suggested that the district court had jurisdiction of the issue of expungment pursuant to its general equitable powers and pursuant to the United States Constitution. The Court of Appeals' jurisdiction was founded in Title 28 U.S.C. Section 1291, which grants the power to review final orders of the district court.

REASONS FOR GRANTING THE WRIT

I

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING EXPUNGMENT OF RECORDS WHICH WERE DIRECTLY AND SOLELY THE RESULT OF AN UNCONSTITUTIONAL SEARCH AND

SEIZURE IS IN CONFLICT WITH THE OPINIONS OF OTHER CIRCUITS ON THE ISSUE OF THE RIGHT TO EXPUNGMENT OF RECORDS RESULTING FROM ILLEGAL SEARCHES AND SEIZURES.

Despite the fact that Petitioner clearly raised the issue in both the district court and on appeal, both courts below failed to directly address the issue of whether the fact that the records which are the subject of this Petition are the direct and proximate result of a Constitutional violation requires that they be treated differently from records which result from a criminal charge which is merely dismissed or in which there is an acquittal but in which the records were not created as the result of a Constitutional violation. Rather, relying on Doe v. United States, 859 F. 2d 1334 (8th Cir. 1988) and United States v.

McMains, 540 F. 2d 387 (8th Cir. 1976) the Court of Appeals found that expungment was not appropriate because this case presents no "extraordinary circumstances" and that the power to expunge criminal records is a narrow one. Relying on United States v. Linn, 513 F. 2d 925 (10th Cir.) cert denied, 423 U.S. 836 (1975), the Court of Appeals also found that expungment is normally reserved for "extreme cases". Relying on United States v. Schnitzer, 567 F. 2d 536 (2nd Cir. 1977), cert denied, 435 U.S. 907 (1978) and Linn, supra, the Court of Appeals also found that requests for expungment are to be weighed on a case by case basis with consideration being given to the government's need to maintain records to assist in effective law enforcement.

None of the cases relied on by the courts below involved records which were

solely and completely and indisputably the result of a Constitutional violation. Because it is undisputed that all of the records in issue exist directly and solely because of a Constitutional violation, the Eighth Circuit arrived at a result which places it in conflict with several other federal Circuit Courts of Appeals, all of which have found that a violation of a federal Constitutional right is in itself cause for expungment of records which result from that violation. See Diamond v. United States, 649 F. 2d 496, 499 (7th Cir. 1981); McLeod v. United States, 385 F. 2d 734, 749 (5th Cir. 1967); Tarlton v. Saxbe, 507 F. 2d at 1120, n. 2 (D.C. Cir. 1974) Chatain v. Kelley, 510 F. 2d 1232, 1235-36 (D.C. Cir. 1975), citing Peters v. Hobby, 349 U.S. 331, 75 S. Ct. 790, 99 L. Ed. 1129. See also, Paton v. LaPrade, 524 F. 2d 862, 869 (3rd Cir. 1975) (when

considering request for expungment, it is appropriate to consider the tainted manner in which the records were acquired); Thompson v. United States Department of Transportation, 547 F. Supp. 274, 282 (S.D. Fla. 1982) (same).

This Court should grant certiorari to resolve this conflict among the Circuits.

II

THE ISSUE OF THE RIGHT OF ONE WHO HAS BEEN THE VICTIM OF AN ILLEGAL SEARCH AND SEIZURE TO THE EXPUNGMENT OF ALL RECORDS WHICH RESULT FROM THAT CONSTITUTIONAL VIOLATION IS AN IMPORTANT FEDERAL QUESTION WHICH HAS NEVER BEEN SETTLED BY THIS COURT.

It appears that this Court has only addressed the issue of expungment of unconstitutionally compiled records on one occassion, in Peters v. Hobby, 349 U.S.

331, 75 S. Ct. 790, 99 L. Ed. 1129 (1955). In Peters, this Court found that, where records were the result of a constitutional violation involving denial of due process, the victim of that violation was entitled to their expungment as his remedy:

> "There only remains for consideration the question of relief. Initially petitioner is entitled ... He is further entitled to an order directing the respondent members of the Civil Service Commission to expunge from its records any ruling that Petitioner is barred from federal employment ...". (emphasis added).

Peters v. Hobby, supra, 349 U.S. at 348-349, 75 S. Ct. at 799.

While this Court has not previously addressed the issue of the remedy due one

who has been the victim of an illegal search in terms of the right to expungment of records resulting from that Constitutional violation, the principle that one who has been the victim of a Constitutional violation is entitled to a remedy which will, in so far as possible, restore him to the position he would have been in without the violation is well established in this Court's case law. Once the violation of a Constitutional right has been shown, then, as this Court found in Carter v. Greene County, 396 U.S. 320, 340, 90 S. Ct. 518, 24 L. Ed. 2d 145, 154, citing Louisiana v. United States, 380 U.S. 145, 154, 85 S. Ct. 817, 13 L. Ed. 2d 709, 715, courts have "not merely the power, but the duty to render a decree which will so far as possible cure the harm done." See also, Swann v. Charlotte-Ecklenberg Board of Education, 92 S.

Ct. 1267, 1276, 402 U.S. 1, 15-16.

The issue of whether one about whom records are created solely as the result of an illegal search is entitled to expungment as a remedy for the violation of his Constitutional rights is an important federal question which this Court has not, but should, resolve because, as this Court has said when discussing the nature and scope of the remedy required once it has been established that a Constitutional violation has occurred:

> "Where "a constitutional violation has been found, the remedy does not "exceed" the violation if tha remedy is tailored to cure 'the condition that offends the constitution'" [authority]"

Rogers v. Lodge, 458 U.S. 613, 628, 102 S. Ct. 2570, 2575, 73 L. Ed. 2d 1012 (1982).

III

THE OPINION BELOW WILL LESSEN THE DETERRENT EFFECT OF THE EXCLUSIONARY RULE BECAUSE REFUSING TO REQUIRE EXPUNGMENT OF ALL RECORDS RESULTING FROM UNCONSTITUTIONAL SEARCHES WILL ALLOW POLICE OFFICERS TO RETAIN SUBSTANTIAL BENEFITS FROM THEIR ILLEGAL CONDUCT.

In refusing to order expungment, the Court of Appeals stated that the records which were concededly compiled solely as the result of an unconstitutional search "represent valuable law enforcement records." and that "The unlawful seizure of the weapons discovered in Bagley's briefcase did not affect Bagley's indictment, United States v. Calandara, 414 U.S. 338, 343-345 (1974)." The panel's reliance on Calandara for the proposition that Petitioner is not

entitled to expungment because the grand jury was not precluded from using the illegal evidence to bring the indictment is misplaced. As this Court explained in Calandara, 414 U.S. at 348-355, 94 S. Ct. at 620-623, the exclusionary rule is not applied to grand jury investigations because its purpose would not be significantly furthered by its application in that context because the mere obtaining of an indictment with no hope of conviction is not likely to foster police misconduct, and because its application there would be detrimental to the grand jury's effective functioning. This Court specifically went on to point out, however, see note 10, that grand jury considerations aside, the victim of an illegal search has remedies which include a suit under Title 42 U.S.C. Section 1983 for damages and for return of illegally seized property. Calandara,

therefore, is not authority for the proposition that Appellant is not entitled to the remedy of expungment which he seeks here.

The Court of Appeals went on to find that, because the exclusionary rule is a deterrent to unlawful searches and seizures, Petitioner received his Fourth Amendment remedy when the district court suppressed the illegally seized firearms. It also held that while "mistaken and unlawful", the officers' actions were not in "flagrant disregard" of the Fourth Amendment.

While Petitioner would suggest that there is nothing mutually exclusive about the application of the exclusionary rule to deter police misconduct and the availability of other remedies as well, such remedies being available for the violation of <u>any</u> Constitutional right, the

Court of Appeals also missed the mark when it overlooked the fact that the considerations which favor the exclusionary rule would be furthered by the expungment sought here and that, in fact, allowing police officers to retain information which results from Constitutional violations is likely to lessen the deterrent effects of the exclusionary rule.

The Court of Appeals' opinion will tend to lessen the effect of the exclusionary rule because it allows police officers to reap a valuable benefit from their illegal conduct by letting them retain, perhaps for such later use as articulable grounds for street stops and probable cause for future warrant applications, intelligence information derived from their illegal conduct. In order to understand the ramifications of the panel's opinion, a brief discussion of

the rationale supporting the exclusionary rule is in order.

In One 1958 Plymouth Sedan v. Commonwealth Of Pennsylvania, 380 U.S. 698, 700, 85 S.Ct. 1246, 1250 (1968), this Court said:

> "..as Mr. Justice Bradley pointed out in Boyd, a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law."
>
> ...
>
> ".. the nature of a forfeiture proceeding, so well described by Mr. Justice Bradley in Boyd, and the reasons which lead the Court to hold that the exclusionary rule of Weeks v. United States, supra, is obligatory upon the States under the Fourteenth Amendment, so well

articulated by Mr. Justice Clark in Mapp, support the conclusion that the exclusionary rule is applicable to forfeiture proceedings such as the one involved here. ..."

Plymouth Sedan, supra, 380 U.S. at 702, 85 S. Ct. at 1251.

The similarities between the motivation for police officers to attempt to effectuate forfeitures, that is to punish what they see as bad conduct, and their motivation to obtain information which becomes, under the opinion below, permanently enshrined in police records, is quite obvious. In discussing the reasons why the exclusionary rule should apply in forfeiture proceedings, the Eighth Circuit itself has said that evidence used to support the forfeiture must be obtained from an independent, lawful investigation wholly untainted by

the illegality which resulted in the original seizure. United States v. $85,000, 671 F. 2d 293, 296-297 (8th Cir. 1982). As the Court of Appeals explained there, at note 6, citing Plymouth Sedan, supra, the application of the exclusionary rule to forfeiture proceedings is a natural extension of the deterrent purpose first found to justify applying the rule to the states in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684. 6 L. Ed. 2d 1081 (1961). Because the motivations which would foster illegal searches were it not for the exclusionary rule's application to forfeiture proceedings are also largely present if the police are allowed to maintain information in the form of records which are derived from illegal searches, the opinion below will serve to deprive the rule of much of its deterrent effect because police officers

would obtain what most of them would perceive to be substantial benefit as the result of their illegal conduct - a bank of information which they may use to foster future investigations, possibly including citation of that information in future search warrant applications.

As has already been noted, this Court has long since determined that the purpose of the exclusionary rule is furthered by its application to forfeiture proceedings because of their quasi-criminal nature. It is beyond dispute that the Fourth Amendment to the United States Constitution absolutely guarantees the Petitioner the right to be free from unreasonable searches and seizures, a right which would lose much meaning if the victim of an illegal search is not given the right to so far as possible have himself returned to the position he was in

prior to the violation of his rights.

The only constitutionally permissible resolution of the situation here, a situation which came into existance solely as a result of illegal police conduct, is full and complete application of the exclusionary rule, including denying the police any derivative benefit, even in the form of records or intelligence information, from their constitutional violation. Wong Sun v. United States, 371 U.S. 471, 484-485, 83 S. Ct. 407, 415-416 (1963). As this Court explained there:

> "...The exclusionary prohibition extends as well to the indirect as the direct products of such invasions. ' Silverthorn Lumber Co. v United States, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319. Mr. Justice Holmes, speaking for the Court in that case, in holding that the

government might not make use of information obtained during an unlawful search to subpoena from the victims the very documents illegally viewed, expressed succinctly the policy of the broad exclusionary rule:

"The essence of a provision forbidding the acquisition of evidence in a certain way is not that merely evidence so acquired shall not be used before the Court but that it shall not be used at all. [authority] (emphasis added)

The close link between the policy considerations governing application of the exclusionary rule in criminal cases and the policy considerations which should apply to the expungment which Petitioner seeks is readily apparent. As this Court has so recently said in James v. Illinois,

___ U.S. ___, 110 S. Ct. 648, 651 ___ L. Ed. 2d ___ (1990) when it determined that the exclusionary rule does not permit the use of illegally obtained evidence to impeach a defense witness:

> ""There is no gainsaying that arriving at the truth is a fundamental goal of our legal system." [authority]. But various constitutional rules limit the means by which government may conduct this search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation's history. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. ...[W]ithout it the constitutional guarantee against

unreasonable searches and seizures would be a mere 'form of words'" Terry v. Ohio, 392 U.S. 1, 12, 88 S. Ct. 1868, 1875, 20 L. Ed. 2d 889 (1968), quoting Mapp v. Ohio, 367 U.S. 643, 655 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081 (1961). ...."

Applying those considerations here, it is apparent that the purposes of the exclusionary rule would be furthered and that police misconduct would be deterred at relatively small cost to society by ordering the expungment sought. A rule which permits use of even derivative fruits of an illegal search in the form of records which can be used to further future enforcement proceedings would be an outright encouragement to the police lawlessness which the exclusionary rule is designed to deter because it would allow police to obtain a large portion of their

objective by illegally searching and seizing and then using the information gained to further later investigations.

CONCLUSION

For all of the above stated reasons, the Court should grant the requested Writ of Certiorari to review the opinion of the Eighth Circuit Court of Appeals denying expungment of records which resulted solely from an unconstitutional search.

DATED this 16th day of July, 1990.

Respectfully submitted,

/S/_____

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CERTIFICATE OF SERVICE

I hereby certify that I have served two (2) copies of the above and foregoing on counsel for the opposing party by depositing same in the United Stats mail, with postage prepaid, addressed to:

Office of the Solicitor General
U. S. Department of Justice
Washington, D.C. 20530

DATED this 16th day of July, 1990.

/S/_____

Francis L. Goodwin

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	CR86-4025
v.	)	ORDER
HUGHES ANDERSON BAGLEY, JR., Defendant.	)	

This matter is before the court on defendant's resisted motion for an order directing expungment of records and on defendant's resisted motion to compel return of illegally seized property. After careful consideration of the parties briefs and arguments made at a hearing held in this case, the court hereby denies defendant's motions.

The genesis of this case was the arrest of defendant under indictment charging him with illegal receipt, as a felon, of firearms shipped and transported

in interstate commerce in violation of 18 U.S.C. Sec. 922(h)(1), 924(a) and (2). By an Order of this court, upon motion by defendant, evidence consisting of the firearms in question was suppressed as the fruits of an illegal search and seizure. The United States subsequently dismised its case against defendant.

I. Motion for Order Directing Expungment of Records.

Defendant is now before this court asking that a broad category of records pertaining to this matter be destroyed. Specifically, defendant seeks expungment of the following documents:

1. All transcripts and stenographic notes of grand jury proceedings taken as a result of the unlawful search of defendant's briefcase on January 22, 1984.

2. All copies of interviews conducted as a result of the unlawful search of

as a result of the unlawful search of defendant's briefcase on January 22, 1984.

3.) All copies of the indictment in this case.

4.) All copies of warrants and detainers issued for defendant as a result of the indictment in this case.

5.) All references to the indictment in this case in defendant's Federal Bureau of Investigation "rap sheet" or "computerized criminal history" maintained by the Federal Bureua of Investigation.

6.) All pleadings filed in this case.

7.) All transcripts or stenographic notes of hearings held in this case.

8.) All orders issued in this case except the order directing expungment of records.

9.) All records of the make, model, serial number, caliber or description of items seized on January 22,1984, including

copies in the possession of the office of the United States Attorney for the Northern District of Iowa, the United States Department of Justice, the United States Parole Commission, the Bureau of Alcohol, Tobacco and Firearms, the Plymouth County Sheriff's Office, the Iowa Division of Criminal Investigation, and any such references contained in the personal notebooks of the officers involved in the illegal search.

10.) Any other records by whatever agency they are maintained, resulting from the illegal search of defendant's briefcase on January 222, 1984.

Defendant argues that expungment of these records is appropriate because they were all produced as a direct result of of a

constitutional violation. The United States resists, stating that legitimate

government interests militate in favor of retention of records.

The law is well established that the federal courts have inherent power to expunge criminal records when necessary to preserve basic legal rights. See United States v. McMains, 540 U.S. [sic] 387, 389 (8th Cir. 1976). No federal statute addresses the issue now before the court. Rather, the power to order expungment of criminal records lies within the equitable discretion of the court, and relief is usually granted only in "extreme circumstances." See United States v. Schnitzer, 567 F. 2d 536, 539 (2nd Cir. 1977), cert denied, 435 U.S. 907 (1978). Under this approach, the court has a duty to apply a balancing test by which it weighs the government interest and [sic] effective law enforcement against the privacy interest of the individual. See Schnitzer,

567 F. 2d at 539; United States v. Rosen, 343 F. Supp. 804, 806 (S.D. N.Y. 1972). This court must apply this balancing test on a case-by-case basis. See Diamond v. United States, 649 F. 2d 496, 498 (7th Cir. 1981); United States v. Linn, 513 F. 2d 925, 927 (10th Cir.) cert denied, 423 U.S. 836 (1975).

The Schnitzer court elaborated upon the competing interests, setting forth in greater detail some of the factors that this court should consider in reaching its decision. The Schnitzer court noted that:

> "[R]etaining and preserving arrest records serves the important function of promoting effective law enforcment. Such records help to meet the "compelling public need for the acquisition, preservation, and exchange of identification procedure." United States

v. Seasholtz, 376 F. Supp. 1288, 1290 (N.D. Okla. 1974).

Schnitzer, 567 F. 2d at 539. In contrast, the Schnitzer court emphasized that "an arrest record alone can create serious adverse consequences for those who have been arrested in the past, notwithstanding the ultimate disposition of the case." Schmnitzer, 567 F. 2d at 539. Further,

> "[E]ven if no direct economic loss is involved, the injury to an individual's reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may restricted or nonexistent as a consequence of the mere fact that an arrest, even if followed by an acquittal or complete exoneration of the charges involved."

Menard v. Mitchell, 430 F. 2d 486, 490 (D.C. Cir. 1970) (footnotes omitted).

While weighing the equities in determining the appropriateness of expungment, the court must be cognizant that the power to expunge is "a narrow one, usually exercised in cases of illegal prosecution or acquittals and is not to be routinely used." United States v. McMains, 540 F. 2d at 390. See also Schnitzer, 567 F. 2d at 539 ("[T]he power to expunge 'is a narrow one, and should not be routinely used whenever a criminal prosecution ends in an acquittal, but should be reserved for the unusual or extreme cases.'"), citing United States v. Linn, 513 F. 2d at 927. The Schnitzer court provided four examples of cases in which courts have found expungment of records appropriate:

"[W]here procedures of mass arrest rendered judicial determination of

probable cause impossible; where the court determined the sole purpose of the arrest was to harass civil rights workers; where the police misused

police records to the detriment of the defendant; or where the arrest was proper but was based on a statute later declared unconstitutional."

Schnitzer, 567 F. 2d at 540 (citations omitted.

These cases should be compared with others in which the courts found expungment inappropriate. In Schnitzer, for example, the court noted that Schnitzer's arrest and indictment were legal, but the dismissal of the indictment did not concede the innocence of the defendant. See Schnitzer, 567 F. 2d at 540. Finding that the indictment was dismissed because the prosecutor did not

believe he could establish Schnitzer's guilt beyond a reasonable doubt, the court denied the defendant's motion for expungment of the records, noting that he had not shown that his records have been released or were subject to potential misuse. See Schnitzer, 567 F. 2d at 540. See also United States v. Linn, 513 F. 2d at 928 (where jury acquitted defendant at trial and defendant has shown no misuse of records, expungment not justified.) 1/

Reviewing the equities in the case at bar, the court is not persuaded that the extreme remedy of expungment is warranted. Bagley was indicted based upon the fruits of an illegal search

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1The court is aware of the recent case plaintiff provided the court, United States v. Bagley, CR 77-330(V)D, Western District of Washington (1988), in which

the district court ordered the limited expungment of Bagley's presentence report because of government interference with Bagley's right to a fair trial. The court is not persuaded by this case, however, because the factual background of the case is unknown, only one document was expunged (unlike the broad expungment requested by Bagley in this case), and because a district court ruling in Washington state over an issue left to the discretion of the district court on a case-by-case basis has no binding effect on this court's judgment even though it did involve the same person now before this court.

and seizure. No harassment has been charged or is apparent from the facts. The police found guns as a result of their unconstitutional search, the possession of which is illegal for a convicted felon.

The guns were suppressed as evidence because they were obtained without a warrant. The court must keep in mind that the exclusionary rule is itself an extreme remedy found in few courts of law outside the United States. The court finds nothing to distinguish this case from every other case where suppression of a key piece of evidence results in the dismissal of the case. The court finds it difficult to image that expungment, a remedy to be used only in extreme circumstances, should be exercised every time a case is dismissed because evidence is suppressed. Defendant has cited no case in which this has been done previously by another court. The court notes that Bagley's record is not pristine, therefore negating any argument by defendant that these records alone will tarnish his reputation. This court

suggests that defendant's remedy was granted when the court suppressed the evidence at his criminal trial. Based upon the above, the court hereby denies defendant's motion for an order directing expungment of records.

II. Motion For Return of Illegally Seized Property.

Defendant has also brought before this court a motion for an order compelling return of the evidence suppressed in his criminal case, which evidence was seized in violation of defendant's fourth amendment right against illegal searches and seizures. This motion is brought under rule 41(e) of the Federal Rules of Criminal Procedure, which reads in pertinent part:

"A person aggrieved by an unlawful search and seizure may move the district

court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized." Fed. R. Crim. P. 41(e) (emphasis added). The property defendant seeks to have returned is a Smith and Wesson Model 629 revolver; a Colt Model Mark IV, .45 caliber automatic pistol; miscellaneous ammunition; assorted personal property; and a brown briefcase.

Defendant is a convicted felon. He acknowledges that, in his status, he may not lawfully possess firearms or ammunition. See 18 U.S.C. Sec. 922(g). Because he recognizes this prohibition, defendant has suggested that the court order the property turned over to a third party, possibly a licensed firearms dealer, for sale with defendant to receive

the proceeds.

While this is a unique suggestion, defendant cites no authority which holds that allowing a person to retain the economic benefit of possession, while lacking actual possession, is not a violation of 18 U.S.C. Sec. 922(g). The government, however, has cited no authority to the contrary. Nevertheless, this court finds that to allow defendant to reap the economic benefit from ownership of weapons and ammunition which it is illegal for him to possess would make a mockery of the law. Therefore, this court holds that defendant is not entitled to the return of the guns and ammunition, either to himself or to his agents from which he seeks to gain the economic benefit of possession, for defendant has failed to demonstrate that he is entitled to the legal possession of

these items as required by

Fed. R. Crim. P. 41(e). 2/ The court finds, however, that under the Federal Rules of Criminal Procedure, defendant is entitled to return of his briefcase and all other personal property to which he has a lawful right of possession. By a supplemental resistance filed by the United States on February 2, 1989, the government has notified the court that it discovered marijuana in defendant's briefcase. Defendant is not entitled to possession of a controlled substance. Therefore, defendant shall not have a right to possession of the weapons, the ammunition, nor the marijuana.

Upon the foregoing:

IT IS THEREFORE ORDERED that the defendant's motion for an order directing the expungment of records is hereby

denied.

IT IS FURTHER ORDERED that defendant's motion to compel return of illegally seized property is hereby denied as to the two handguns, the ammunition, and the marijuana, but is granted as to the briefcase and other personal property.

February 3, 1989.

/s Donald E. O'Brien
Chief Judge United
States District Court

2/ The defendant has further argued in the alternative that he is entitled to possesion of the weapons in question because the government failed to comply with rule 7(c)(2) of the Federal Rules of Criminal Procedure dealing with forfeiture. Defendant is incorrect, however, in arguing that this provides him

with a basis for return of the property. This case is not one of forfeiture, but rather one where, because of the nature of the property, defendant has no right to possession. Rule 41(e) of the Federal Rules of Criminal Procedure places upon the defendant the burden of proving entitlement to lawful possession. It is because defendant is unable to prove entitlement to lawful possession that this court has denied him his motion to compel return of his property.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 89-1304

United States of America,	*	Appeal From
	*	the United
Appellee,	*	States
	*	District
v.	*	For The
	*	Northern
Hughes Anderson Bagley, Jr.	*	District of
	*	Iowa
Appellant.	*	

Submitted: October 9, 1989

Filed: March 14, 1990

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

Hughes Anderson Bagley, Jr. appeals from the district court's denial of his motions to expunge all records of his arrest and indictment, and for the return of illegally seized weapons. We affirm.

As part of an ongoing criminal investigation, law enforcement officers arrested Bagley and acquired a locked briefcase from Bagley's home. Without

obtaining a search warrant, the officers opened the briefcase and discovered two handguns inside. Bagley was later indicted as a felon in receipt and possession of firearms. Before trial on the indictment, Bagley moved to suppress the weapons claiming they were seized in an illegal search, and the district court granted his motion. The government then dismissed the indictment, and Bagley brought his motions for expungment and return of the weapons.

- 1 -

Guided by well established principles, we conclude Bagley's case presents no extra-ordinary circumstances warranting expunction. See United States v. Doe, 859 F. 2d 1334, 1336 (8th Cir. 1988). The district court has a narrow power to expunge criminal records, United States v.

McMains, 540 F. 2d 387, 389-90 (8th Cir. 1976), which is infrequently exercised, United States v. Friesen, 853 F. 2d 816, 818 (10th Cir. 1988), and reserved for unusual or extreme cases, United States v. Linn, 513 F. 2d 925, 927 (10th Cir.), cert denied, 423 U.S. 836 (1975). The district court balances the government's need to maintain extensive records to aid in effective law enforcement against the harm to the individual of maintaining these records by examining requests for expunction on a case-by-case basis. United States v. Schnitzer, 567 F. 2d 536, 539-40 2nd Cir. 1977), cert denied, 435 U.S. 907 (1978); Linn, 513 F. 2d at 927. We review the district court's decision to expunge under an abuse of discretion standard. United States v. International Harvester Co., 720 F. 2d 418, 419 (5th Cir. 1983), cert denied, 466 U.S. 939

(1984).

In our view, Bagley's arrest information and indictment represent valuable law enforcement records, and the adverse consequences to Bagley of preserving the records are minimal. The unlawful seizure of the weapons discovered in Bagley's briefcase did not affect Bagley's indictment, United States v. Calandara, 414 U.S. 338, 343-45 (1974), nor did the government concede Bagley's innocence in dismissing the indictment, see Schnitzer, 567 F. 2d at 540. Indeed, Bagley's guilt is clear apart from the intervention of the exclusionary rule. See Stone v. Powell, 428 U.S. 465, 490 (1976).

Because the exclusionary rule is a deterrent to unlawful police conduct, Bagley received his fourth amendment remedy when the district court suppressed

Bagley's weapons for trial purposes. Calandara, 414 U.S. at 347. Although mistaken and unlawful, the officers' actions in this case were not taken in flagrant violation

of the fourth amendment. See Menard v. Saxbe, 498 F. 2d 1017, 1023 (D.C. Cir. 1974). Bagley does not claim he was the victim of police harassment, see Linn, 513 F. 2d at 927-28, nor does he suggest his conviction was sought for illegal purposes. United States v. McLeod, 385 F. 2d 734, 749-50 (5th Cir. 1967). Further, Bagley has failed to show the government will misuse the retained records against him, see Linn, 513 F. 2d at 928, or he would suffer serious adverse consequences if the government is permitted to maintain the records. Schnitzer, 567 F. 2d at 539-40.

We thus agree with the district court that Bagley's case is indistinguishable "from every other case where the suppression of a key piece of evidence results in dismissal" of the indictment. Like the district court, we "find [] it difficult to imagine that expun[ction], a remedy to be used in extreme circumstances, should be exercised every time a case is dismissed because evidence is suppressed." We conclude the district court did not abuse its discretion in denying Bagley's motion for expungment.

Bagley also sought return of the weapons seized from the briefcase. A person who is entitled to lawful possession of illegally seized property may move for the return of the seized property. Fed. R. Crim. P. 41(e). As a convicted felon, Bagley cannot lawfully possess the weapons. 18 U.S.C. 922(g)

(1988). Bagley concedes he is not entitled to possession of the weapons, but argues the weapons should be sold by a third party with the proceeds remitted to Bagley. Bagley's argument is frivolous. We agree with the district court "that to allow [Bagley] to reap the economic benefit from ownership of weapons [] which it is illegal for him to possess would make a mockery of the law."

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 89-1304NI

United States of America,	*	
	*	Order
Appellee,	*	Denying
	*	Petition
v.	*	For Rehear-
	*	ing and
Hughes Anderson Bagley, Jr.,	*	Suggestion
	*	For Rehear-
Appellant.	*	ing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

April 19, 1990

Order entered at the direction of the Court:

/S Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

No. 90-125

FILED
OCT 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

HUGHES ANDERSON BAGLEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
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QUESTION PRESENTED

Whether petitioner was entitled to expungement of the records of his arrest and indictment for receipt of weapons by a convicted felon where the district court suppressed the weapons as the products of an illegal search and the indictment was subsequently dismissed.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-125

HUGHES ANDERSON BAGLEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 19-25) is reported at 899 F.2d 707. The judgment of the district court (Pet. App. 1-18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1990. A petition for rehearing was denied on April 19, 1990. Pet. App. 26. The petition for a writ of certiorari was filed on July 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

As part of an ongoing criminal investigation, law enforcement officers arrested petitioner and acquired a locked briefcase belonging to him. They opened the briefcase without obtaining a search warrant and discovered two handguns inside. Pet. App. 19-20. A grand jury indicted petitioner, charging him with receipt and possession of firearms by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1)[1] and 18 U.S.C. App. 1202(a) (1982). Petitioner moved to suppress the guns on the ground that they were seized in the course of an illegal search. The district court granted the motion and, on the government's motion, dismissed the indictment. Pet. App. 19-20. Following the dismissal, petitioner moved for the expungement of all the records of his arrest and indictment. The district court denied the motion. Pet. App. 1-13.

Petitioner appealed. The court of appeals weighed the government's need to retain the records for effective law enforcement purposes against the harm to petitioner caused by the retention and concluded that the district court did not abuse its discretion by declining to order expungement. Pet. App. 21-22. The court found that petitioner's arrest information and indictment constituted "valuable law enforcement records," Pet. App. 22, and that petitioner had failed to show that the government would misuse the records or that he would otherwise suffer serious adverse consequences if the records were retained, Pet. App. 23. In rejecting petitioner's argument that expungement of the records was required by the

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[1] The indictment alleged a violation of 18 U.S.C. 922(h)(1), but that appears to be a typographical error; the conduct described in the indictment violates 18 U.S.C. 922(g)(1).

Fourth Amendment exclusionary rule, the court explained that the requirements of the exclusionary rule were met when the district court barred the government from using the weapons as evidence at trial. Pet. App. 22-23.

ARGUMENT

Petitioner renews his contention that the records of his arrest and indictment should be expunged. The court below properly rejected this fact-bound claim; it merits no further review.

Expungement is a remedy that lies within the equitable discretion of the district court, and "relief usually is granted only in 'extreme circumstances.'" *United States* v. *Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977), cert. denied, 435 U.S. 907 (1978); see also *United States* v. *Friesen*, 853 F.2d 816, 817-818 (10th Cir. 1988); *United States* v. *McMains*, 540 F.2d 387, 389, 390 (8th Cir. 1976); *Rogers* v. *Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972). In determining whether such circumstances are present, courts have balanced the government's interest in retaining arrest records against the harm to the defendant that retention of the records may cause. *Schnitzer*, 567 F.2d at 539; *United States* v. *Linn*, 513 F.2d 925, 927 (10th Cir.), cert. denied, 423 U.S. 836 (1975).

The courts below correctly struck the balance in this case against expungement. The retention of arrest records serves the important function of promoting effective law enforcement. Such records help to meet the "'compelling public need for an effective and workable criminal identification procedure.'"[2]

[2] In any particular case, the court must consider not only the government's need to maintain a specific arrest record; in addition, "the general need of the government for a system of

Schnitzer, 567 F.2d at 539. Congress explicitly recognized this need in 28 U.S.C. 534(a), which requires the Attorney General to acquire and retain criminal identification and crime records.

While an arrest record can give rise to adverse consequences for the person arrested, see, *e.g.*, *Schnitzer*, 567 F.2d at 539, petitioner has failed in this Court or in the courts below to point to any particular harm that he would suffer if the government retained his records. See Pet. App. 23; see, *e.g.*, *Linn*, 513 F.2d at 928. Nor has he explained how retention of the records will add significantly to the potential for harm already created by his previous criminal records. Pet. App. 12.

Petitioner does not claim that he was a victim of police harassment, that his conviction was sought for illegal purposes, that the government will misuse the retained records, or any other special circumstance necessitating expungement in this case. And, of course, in dismissing the indictment, the government did not concede petitioner's innocence; to the contrary, the court of appeals correctly noted that "[petitioner's] guilt is clear apart from the intervention of the exclusionary rule." Pet. App. 22.

In fact, as both courts below observed, this case is indistinguishable "from every other case where suppression of a key piece of evidence results in the dismissal of the case," Pet. App. 12, and " 'it [is] difficult to imagine that expun[ction], a remedy to be used in extreme circumstances, should be exercised every time a case is dismissed because evidence is suppressed.' " Pet. App. 24 (quoting district court). Indeed, as the court of appeals observed, Pet. App.

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records must add considerable weight to the government side of the balance." *Schnitzer*, 567 F.2d at 540 n.6.

23, "[a]lthough mistaken and unlawful, the officers' actions in this case were not taken in flagrant violation of the fourth amendment." The exclusionary rule served the function in this case for which it was designed: it prohibited the government from using against petitioner at trial evidence that was obtained in violation of petitioner's Fourth Amendment rights. Accordingly, as the court of appeals observed, "[petitioner] received his fourth amendment remedy when the district court suppressed [his] weapons for trial purposes." Pet. App. 22-23.[3] The exclusionary rule requires no more.

In any case, we doubt the validity of petitioner's premise that the retention of arrest records in these circumstances significantly threatens the deterrent function of the exclusionary rule. It is improbable that a police officer would engage in conduct he knew to be illegal, risking a civil action for damages and departmental disciplinary measures, for the sole purpose of creating records. But even assuming that some incremental deterrence would be obtained by requiring expungement of the records produced as a result of a Fourth Amendment violation, the maximization of deterrence has never been this Court's sole touchstone in deciding whether to apply the exclusionary rule or other sanction to a particular class of case. Rather, in recognition of the costs imposed by the exclusionary rule, the Court has restricted the application of the rule "to those areas where its remedial objectives are thought most efficaciously

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[3] Contrary to his assertion, Pet. 10, the cases cited by petitioner do not conflict with the result in this case. None of the cases concerned application of the exclusionary rule, or a consideration of whether the remedy dictated by that rule should include expungement of records.

served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). The negligible amount of additional deterrence that might conceivably result from expungement does not justify its adoption in the ordinary case.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

OCTOBER 1990

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[4] Nor is petitioner helped, see Pet. 19-22, by the fact that the exclusionary rule applies to forfeiture proceedings. See *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965). A forfeiture is "clearly a penalty for [a] criminal offense," *id.* at 701; maintenance of arrest records is not.

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